PREME COURT, U. S.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1968

NO. [redacted] 164

IRVEN LEE DAWKINS and
CAROL W. THOMAS,

Petitioners,

—vs—

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, AND THE SUPREME COURT OF FLORIDA

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NO. 1502

IRVEN LEE DAWKINS and
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—vs—

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, AND THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

WHETHER CONTEMPT CONVICTIONS OF PETITIONERS ARE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR THE PUBLICATION AND DISSEMINATION OF A CRUDELY MIMEOGRAPHED CIRCULAR IN AN AREA IMMEDIATELY ADJACENT TO THE ROOM IN WHICH THE THEN MEETING GRAND JURY OF ALACHUA COUNTY, FLORIDA, WAS BEING HELD AND WHICH CIRCULAR FOUND ITS WAY INTO

THE HANDS OF THE MEMBERS OF THE GRAND JURY AND WAS READ BY THEM CONSTITUTING INTIMIDATION OF THAT GRAND JURY AND EVIDENCING A CLEAR AND PRESENT DANGER THAT SAID CIRCULAR OBSTRUCTED, IMPEDED OR OTHERWISE INTERFERED WITH THE WORK OF THE GRAND JURY IN LIGHT OF THE ATTENDANT CIRCUMSTANCES REFLECTED BY THAT WHICH THE ENTIRE RECORD BELOW WOULD SHOW WERE IN EXISTENCE.

STATEMENT OF THE FACTS

As admitted by the petitioners, they initiated charges against the law enforcement authorities in the City of Gainesville, Florida (Petition, page 19). As a result of said charges the Alachua County Grand Jury was called into session for the purpose of investigating the charges and hearings were scheduled for December 18, 1967. The petitioners were subpoenaed to testify before the grand jury and were thus given the opportunity to present their views on the charges which they themselves initiated. This is apparent from the publication which they distributed. While the grand jury was in session or during a recess, four copies of the publication "Black Voices" were distributed by petitioners (see Answer of Petitioners filed in Circuit Court of Alachua County) to four persons in the hallway adjacent to the grand jury room.

Said publication in addition to accusing various officials of being "racist" and "[N]egro-hating hunkie[s]" stated the ". . . grand-jury is just as racist and Klan infested as the police department. . ." The article then concluded nothing would be

done because "what they will probably do is put in a couple of Uncle Toms to make their findings justifiable". The publication further accused the grand jury of being "fixed".

As a result of the petitioners' actions in distributing the referred to publication in the courthouse when the grand jury was in session, the state attorney filed an affidavit and petition for rule to show cause alleging petitioners were guilty of contempt of court in that the publication held the court and grand jury up to ridicule and ". . . impugned the impartiality of . . . the present grand jury. . ." (R 3-5). The petitioners filed answers admitting that they authored said publication and that they distributed it as set forth above. (R 15). No disclaimer of malicious intent was made.

On the basis of the affidavit and petition for rule to show cause, the stipulation and the answer, the trial judge found the petitioners guilty of contempt and imposed six and four month sentences on Jack Dawkins and Carol W. Thomas respectively. The trial judge entered a lengthy order and after noting that the question was whether the publication ". . . was calculated and intended to interfere with the administration of justice and created a clear and present danger . . ." thereto, made extensive findings. The trial judge found, the publication ". . . itself to be a calculated effort on the part of the respondent (petitioners herein) to interfere with the fair administration of justice, and this being so it would not be necessary to show that it did actually influence the grand jury in any report which may be made. . . ." He further found that inasmuch as the publication was distributed in the courthouse it was probable that said publication would come into the hands of a member of the grand jury, and that the probability of influence in this respect is to be condemned. As to the reference in the publication to Negro members of the grand

jury, the trial judge found these to be a "veiled threat". The court found the publication calculated to produce in the mind a purpose to refuse to accept or respect any report which the grand jury rendered and that it, ". . . under the circumstances, was calculated and intended to interfer with the administration of justice and did create a clear and present danger".

The First District Court of Appeal affirmed the contempt conviction in its written opinion filed March 7, 1968. A copy of said opinion appears in the petition at pages 29 through 37. The District Court was aware of the decisions of this Court in **Pennekamp v. Florida**, 328 U.S. 331, 90 L.ed. 1295; 66 S. Ct. 1029, **Craig v. Harney**, 331 U.S. 367, 91 L.ed. 1546, 67 S. Ct. 1249; and **Wood v. Georgia**, 370 U.S. 375, 8 L.ed.2d 569, 82 S. Ct. 1364, but their examination of those cases failed to persuade them that they were controlling in this case. The court viewed the actions as equivalent to jury tampering rather than criticism and held that, measured in light of standards articulated by this Court in **Bridges v. California**, 314 U.S. 252, 86 L.ed. 192, 62 S. Ct. 190, the evidence presented by the record before it furnished a ". . . rational basis for the trial judge's characterization of appellants' conduct. . . ."

The petitioners thereafter sought a direct appeal in the Florida Supreme Court which was dismissed for want of jurisdiction, and a petition for writ of certiorari to the District Court of Appeal, First District of Florida, which was denied for the same reason.

Without regard to whatever petitioners may have urged upon the Florida Supreme Court in their petition for writ of certiorari to the District Court of Appeal in and for the First

District of Florida, it is clear from the order of the Florida Supreme Court denying certiorari that the exclusive basis for the denial was a determination by the Florida Supreme Court that it lacked jurisdiction to grant the review requested.

The highest court of last resort in the State of Florida and indeed the only one qualified to determine not only its own jurisdiction but that of every other Florida court plainly and simply concluded that it had no jurisdiction in petitioners' case and as a natural consequence thereof, properly denied review by certiorari. In so doing, its action must be accepted as the final word in the matter by an authority no less compelling than this Court's own observation in **Dresner et al. v. Tallahassee,** 375 U.S. 136, 11 L.ed.2d 208, 84 S. Ct. 235.

In the **Dresner** case, supra, this very Court relied on the exclusive authority of the Florida Supreme Court to determine where jurisdiction lay and accepted its findings. Likewise in a series of proceedings, the net result of which was the final action of the Florida Supreme Court in the case of **Callendar et al. v. State,** Fla., 181 So.2d 529, this Court again acknowledged that the final word on jurisdiction in the State of Florida had to rest with the Florida Supreme Court. In that regard, it was certainly no departure from rules longstanding and respected by all courts when the jurisdiction of a sister court is involved. It does seem clear that the Florida Supreme Court properly and authoritatively denied certiorari because it found itself without jurisdiction to entertain the petition. In this regard its decision must be supreme. See **Dresner et al. v. Tallahassee,** supra, and **Callendar et al. v. State,** supra.

ARGUMENT

Respondent maintains that the instant case is clearly distinguishable from the cases relied upon by petitioners; that the actions of petitioners were not protected by the First Amendment; that there is sufficient legal evidence in the record (either admissions by petitioners or legitimate inference of fact drawn by the trial judge) to support the convictions, and that the writ should not be granted.

The petitioners insist that this Court's decisions in **Bridges, Pennekamp, Harney,** and **Wood,** supra, command reversal of the convictions herein. Respondent maintains they do not. Petitioners rely largely upon the decision rendered in **Wood v. Georgia,** supra, as they did in the District Court of Appeal, where they urged this case is "remarkably similar" to the facts in **Wood,** supra, and that case should be controlling. Respondent would suggest in reply, as it did below, that to consider them in such a fashion is to consider only their similarities with total disregard for their vast differences. Differences which are apparent after only a casual examination. A close inspection of this case and the **Wood** case, supra, will reveal that they are about as much alike as a Bengal tiger and a kitten.

The **Wood** case, supra, did not concern itself with ". . . misconduct aimed at influencing the outcome of a trial or a grand jury proceeding . . ." 370 U.S. at 580. In that case the Bibb County Superior Court Judge had instructed the grand jury to conduct an investigation into charges that candidates, Wood being one, for public office had purchased Negro bloc votes. Wood issued to the local press a written statement in which he ". . . criticized the judge's action . . .", 370 U.S. at 579, in calling for the investigation and the method em-

ployed by the judge in doing so. An open letter to the grand jury was given to the bailiff stationed outside their room, who made the letter available to the grand jury at Wood's request. Apparently Wood was not given the opportunity to appear before the grand jury as were petitioners here. Wood was allowed to file a statement of intent where he stated ". . . his purpose in issuing the statements was simply to inform the public of what he sincerely believed to be the other side of the issue created by the charge. . . ." The Georgia Court made no findings and gave no reasons for its actions in finding Wood guilty of contempt nor did the court recognize that it had to review the case in light of **Bridges**, supra, and **Pennekamp**, supra.

In the instant case the abusive language was not directed at the trial judge but at the **grand jury itself** before that body had concluded its deliberations and returned its report. In the case at bar alleged "criticisms" were made before the grand jury had done anything whereas in the **Wood** case, supra, the comments concerned actions already taken by the court. Here the petitioners, who demanded the investigation be conducted, were going to testify before the body whereas in **Wood**, supra, he apparently had to resort to the open letter to get his side before them. The petitioners never disclaimed any malicious intent whereas in the **Wood** case, supra, he did. 370 U.S. at 382. Furthermore, the text in the Wood publication is compatible with his statement of intent. The publication here rendered it impossible for petitioners to disclaim their true motive and purpose.

In the District Court of Appeal, First District, and here petitioners have insisted that their actions constituted "criticism" and that therefore they were protected by the First Amendment (petition, at page 21). Respondent is unable to

understand how petitioners can label their writing "criticism" when the grand jury had not yet concluded their hearings or rendered its decision, unless, of course, they realize that there is a legal difference between criticism and intimidation. Webster's Dictionary defines criticism as judging or evaluating. It is submitted that you cannot criticize something which is to take place in the future! Criticism, indeed, of whom and for what? Who had done anything or refrained from doing anything for or against them, theirs, or their cause? What could they "criticize"—surely not the fact that a grand jury had been called and was sitting to deliberate on the very complaint they made. Notwithstanding petitioners insistence that their publication was "criticism", respondent insists that it was exactly what the trial judge found it to be, to-wit: a calculated effort on the part of petitioners to interfere with the fair administration of justice and a "veiled threat" toward certain members of the grand jury, if indeed not the entire body.

The petitioners' reliance upon the decisions rendered in **Bridges**, supra, **Pennekamp**, supra, and **Harney**, supra, are likewise misplaced. In all of the aforementioned cases the attack was made upon a judge not a group of laymen. The constant theme of the decisions referred to is the view that:

> ". . . A judge who is part of such a dramatic episode can hardly help but know that his decision is apt to be unpopular. But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." 331 U.S. 376.

This view may very well be true, although it has been

questioned (see dissenting opinion by Frankfurter in **Bridges**, supra, and concurring opinion in **Pennekamp**, supra), however as noted by Justice Harlan in **Wood v. Georgia**, supra:

> "'It cannot be assumed with grand jurors, as it has been with judges, Craig v. Harney, supra, (331 U.S. at 376), that they are all "men of fortitude, able to thrive in a hardy climate". What may not seriously endanger are independent deliberations of a judge may well jeopardize those of a grand or petit jury.'" 370 U.S. at 587.

Petitioners erroneously choose to classify judges and grand jurrors in the same category (petition, page 21) when none of the opinions support such equality.

Additionally, in **Bridges**, supra, **Pennekamp**, supra, and **Harney**, supra, the comments alleged to have been contemptuous were published in newspapers as opposed to dissiminated in the presence of the grand jury. Furthermore, **Pennekamp**, supra, concerned action already taken by the trial judge and the effect of the editorial on a jury selected in the future was remote. 328 U.S. at 348. In **Harney**, supra, the court found no threat to the ability of the court to give a fair consideration to the motion for rehearing and the editorial was addressing itself to a trial which is public. Grand jury action is not public until its report is filed and then testimony before it is secret and may not be revealed unless authorized by the court. In **Bridges**, supra, over a strong dissent, the court reversed the contempt conviction because otherwise it would "impute to judges a lack of firmness, wisdom or honor. . ." 314 U.S. at 273. Also, the majority found the conclusion that the utterance tended to interfere with justice was exaggerated. Justice Black was of the opinion that the trial judge no doubt anticipated the reaction to his decision and in all likelihood

knew the position the newspaper would take and therefore the articles were mere "threatened future adverse criticism" 314 U.S. at 273. Were the Alachua County Grand Jurors to be expected to receive such "threatened future adverse criticism"? And is it not relevant that this group of laymen were performing their civic duty by command rather than choice, as is a judge?

The above must clearly demonstrate that this case is different from those previously decided by this Court and none of those mentioned are by any means controlling. In fact the language suggests to the contrary. In **Wood v. Georgia**, supra, the court recognized that courts have the right ". . . to conduct their business in an untrammeled way. . . and that courts necessarily possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions. . ." 370 U. S. at 576 (emphasis supplied). The court also recognized the importance of the grand jury to our judicial and political system. 370 U.S. at 580. It must be informed, and cannot "operate in a vacuum" but certainly it should be free from "criticism" until after it has acted or has done something to deserve criticism. Surely when the grand jury was finished and reported its findings it became subject to the same criticism as courts or people, but ". . . the propriety and necessity of preventing interference with the course of justice by **premature** statement, argument or intimidation hardly can be denied. . ." **Patterson v. Colorado**, 205 U.S. 454, 463.

When the grand jury is conducting an investigation into charges such as were involved in the instant case they should not be "torn from their moorings of impartiality by the undertow of extraneous influence" 328 U.S. 366. Why should the Alachua County Grand Jurors be ". . . 'embarrassed' by hav-

ing matters put into their minds, the effect of which it is impossible to estimate or assess? Of course, there is a public interest in the function and action of the grand jury but the legitimate interest precludes . . . dissimination of matters . . . intended to influence proceedings or inevitably calculated to disturb the course of justice." 328 U.S. 361.

Respondent cannot help but wonder whether this Court would allow the dissimination of like publications immediately adjacent to its conference room while it was considering or deliberating cases pending before it? Should not a grand jury be given the same consideration when deliberating matters properly before it? Clearly all sides should be heard on such matters—indeed the petitioners themselves were heard by the grand jury (see publication)—but when all have had their say, then it is time for deliberation in an atmosphere conducive to impartiality. To have it otherwise would destroy public confidence in our judicial institutions.

At page 15, petitioners suggest they were not guilty of contempt because their effort to intimidate or influence the grand jury was unsuccessful for they note "the publication did not deter the Grand Jury from concluding, in its presentment, that the charges being investigated were not substantiated". Respondent submits this is an example of petitioners' twisted logic. As Justice Jackson pointed out in Craig v. Harney, supra, ". . . The fact that he [the judge] did not yield to it does not prove that the attack was not an effective interferenee with the administration of justice" 331 U.S. 395.

The petitioners attempt to obtain a reversal of their convictions by claiming that due process was violated because they were charged with one crime and convicted of another. Respondent points out that petitioners were charged with in-

pugning the impartiality of the court and the grand jury, which is sufficient to include a charge that they interfered with the administration thereof. In any event, this is the first time these petitioners have made this claim. They did not raise it in the District Court of Appeal, First District. They are therefore precluded from raising the matter here. **Head v. Board of Examiners**, 374 U.S. 424, note 12; 19 L.ed. 2d 983, 83 S. Ct. 175. **Shelly v. Kramer**, 334 U.S. 1, 92 L.ed. 1161, 68 S. Ct. 836.

Petitioners also claim they were denied due process because the District Court of Appeal allowed the record to be supplemented. This was introduced merely to demonstrate that the trial judge's findings and inferences drawn from the stipulated facts were both logical and legally justified. The District Court used them as such. In any event, this was not before the trial judge when he made his findings and ignoring this testimony, the remaining evidence is sufficient.

CONCLUSION

It is not the "verbal 'overkill'" employed by petitioners which prompted the contempt proceedings, nor was it "white racism" as petitioners imply.[1] It is not what they said, although

[1] The President's Commission on Civil Disorders did conclude that "[w]hite racism" and "[r]ace prejudice . . . threatens to affect our future" and was a major cause of urban riots; however, that Commission also noted that ". . . protest groups engaging in civil disobedience who turn their backs on nonviolence, go beyond the constitutionally protected rights of petition and free assembly, and resort to violence to attempt to compel alteration of laws and policies with which they disagree", was a contributing factor thereof. The Commission found that in the spring and summer of 1967, "[m]ilitant organizations, local and national, and individual agitators, . . . sought to encourage violence, and that they helped to create an atmosphere that contributed to the outbreak of disorder. . . ." Advanced copy of Report of the National Advisory Commission on Civil Disorder, 1968, page 9.

that was relevant, it was **where** they distributed their "criticism" and **when** they distributed their "criticism" that brought the corrective power of the court to bear. In finding the petitioners guilty of contempt hopefully these petitioners have been taught that ". . . freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise." 328 U.S. at 356.

For the reasons herein expressed the writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of Florida, First District, and the Supreme Court of Florida to petitioners' counsel, the Honorable Murray A. Gordon, 401 Broadway, New York, New York, and the Honorable Jerome J. Bornstein, 125 S. Court Avenue, Orlando, Florida, by mail, this_____ day of July, 1968.

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